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UNITED STATES OF AMERICA
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11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 GABRIEL GONZALEZ,

17 Defendant.
18

No. CR 04-1189(A)-CAS

GOVERNMENT'S RESPONSE TO
ORDER TO SHOW CAUSE AND MOTION TO
DISMISS DEFENDANT'S MOTION FOR
EMERGENCY PROTECTIVE ORDER

19 Plaintiff United States of America, by and through its counsel
20 of record, the United States Attorney for the Central District of
21 California and Assistant United States Attorney Karen I. Meyer,
22 hereby files its response to this Court's order to show cause and
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1 motion to dismiss defendant's motion for emergency protective order.

2 Dated: October 20, 2020

Respectfully submitted,

3 NICOLA T. HANNA
4 United States Attorney

5 BRANDON D. FOX
6 Assistant United States Attorney
7 Chief, Criminal Division

8 /s/
KAREN I. MEYER
Assistant United States Attorney

9 Attorneys for Plaintiff
10 UNITED STATES OF AMERICA
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 On August 31, 2020, defendant filed a motion for emergency
4 protective order for Forrest City-FCI to be ordered to provide
5 prescription antacid medication to defendant free of charge to treat
6 his gastroesophageal reflux disease ("GERD"), (CR 222), despite
7 Forrest City-FCI being in compliance with the Bureau of Prisons'
8 policy regarding dispensation of medication. Defendant asserts
9 without support that he has been denied treatment because of his
10 complaint over lack of treatment upon testing positive for COVID-19.
11 On October 6, 2020, this Court issued an order to show cause as to
12 why the government should not continue to provide defendant his
13 medication.

14 Defendant's motion should be dismissed because this Court does
15 not have the authority to address conditions of confinement as part
16 of defendant's criminal case. Defendant is required to file a civil
17 action pursuant to 28 U.S.C. § 1963 to challenge his prison
18 conditions in a venue proper to hear such matters, which would be in
19 the Eastern District of Arkansas, not the Central District of
20 California. Finally, any civil action cannot be brought until
21 defendant exhausts his administrative remedies under the Prison
22 Litigation Reform Act.

23 **II. FACTS**

24 Defendant states that Forrest City-FCI has recently required him
25 to purchase his antacid medication at the prison commissary, that he
26 has been unable to obtain the medication in sufficient supply to last
27 between periods when he has access to the commissary, and that
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1 lockdown has made it difficult for him to earn enough at his prison
2 law library job to purchase the medication. (Mot. at 2.) Defendant
3 seeks an order that the facility continue to provide him his
4 medication free of charge.

5 As reflected in the BOP's Program Statement, attached hereto as
6 Exhibit A:

7
8 Inmates may buy OTC medications which are available at the
9 commissary. Inmates may also obtain OTC medications at sick
10 call if the inmate does not already have the OTC medication
11 and:

12 a. Health services staff determine that the inmate has an
13 immediate medical need which must be addressed before
14 his or her regularly scheduled commissary visit; or

15 b. The inmate is without funds.

16 Program Statement, Exhibit ("Ex.") A, at 1. An inmate without funds
17 "is an inmate who has not had a trust fund account balance of \$6.00
18 for the past 30 days." Id.

19 Emails between defendant and the facility indicate that as
20 recently as September 14, 2020, defendant was advised to either
21 purchase the medication through his trust fund account, or to obtain
22 the medication through sick call.¹ Emails, attached hereto as Ex. B.
23 As noted above, for medication to be dispensed through sick call,
24 health services staff must determine that the inmate "has an
25 immediate medical need" before the inmate's next commissary visit.

26 Defendant has not provided any information that his trust fund
27 account balance fell below the \$6.00 monthly requirement that would

28 ¹ It should be noted that in June 2020, defendant was given a
prescription for Omeprazole for esophageal reflux. Medical Records,
Ex. C.

1 obligate the facility to provide the medication free of charge, or
2 that he has been denied medication through sick call despite a
3 determination of "immediate medical need."

4 **III. ARGUMENT**

5 **A. This Court Has No Authority to Hear Defendant's Motion for 6 Emergency Protective Order**

7 It is settled that an inmate's challenges to the *conditions* of
8 his or her confinement are only properly asserted in a civil rights
9 action. Preiser v. Rodriguez, 411 U.S. 475, 484, 498-499
10 (1973)(contrasting petitions for habeas relief with civil rights
11 actions); United States v. Antonelli, 371 F.3d 360, 361 (7th Cir.
12 2004) (recognizing that a motion in a criminal case was actually a
13 separate civil action raising a facial challenge to a BOP policy).
14 "The practice in the Ninth Circuit long has been that challenges to
15 conditions of confinement be brought in a civil rights complaint."
16 McKinney v. Biter, 2016 WL 741984, *2 (N.D. Cal. 2/25/16) (citing
17 Badea v. Cox, 931 F.2d 573, 574 (9th Cir. 1991) (civil rights action
18 proper method to challenge conditions of confinement), Crawford v.
19 Bell, 599 F.2d 890, 891-92 & n.1 (9th Cir. 1979) (affirming dismissal
20 of habeas petition because challenges to terms and conditions of
21 confinement must be brought as civil rights complaint)).

22 Further, such actions must be brought in the proper venue.
23 "Venue generally is proper in a judicial district in which any
24 defendant resides or in a judicial district in which a substantial
25 part of the events or omissions giving rise to the claim occurred."
26 McKinney, 2016 WL 741984, *2 (citing 28 U.S.C. § 1391(b)). As the
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1 district court in McKinney noted, "[a] civil rights complaint about
2 the conditions of confinement at Folsom State Prison in Sacramento
3 County generally should be filed in the Eastern District of
4 California. A civil rights complaint about the conditions of
5 confinement at Kern Valley State Prison in Kern County generally
6 should be filed in the Eastern District of California. A civil
7 rights complaint about the conditions of confinement at Salinas
8 Valley State Prison in Monterey County generally should be filed in
9 the Northern District of California." Id.

11 Similarly, any civil rights complaint pursuant to 42 U.S.C.
12 § 1983 challenging the conditions of defendant's confinement should
13 be brought in the Eastern District of Arkansas, where Forrest City-
14 FCI is located. This Court does not have authority to direct the
15 Federal Bureau of Prisons to provide defendant with medication at
16 Forrest City-FCI in Forrest City, Arkansas, an institution well
17 outside the geographical limits of the Central District of
18 California.

20 **B. Any Civil Rights Complaint Must Satisfy the Exhaustion**
21 **Requirements of the Prison Litigation Reform Act**

22 Even if construed as a separate civil action filed in the proper
23 venue, defendant's motion faces mandatory dismissal under the Prison
24 Litigation Reform Act of 1995 ("PLRA"). Defendant cannot proceed
25 with any claim without first satisfying the provisions of the PLRA,
26 which contains a number of requirements that an inmate must fulfill
27 before being able to proceed with an action, including the
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1 requirement to exhaust administrative remedies before filing suit.
2 See Booth v. Churner, 532 U.S. 731, 741 (2001); 42 U.S.C. § 1997e(a)
3 (stating that "[n]o action shall be brought with respect to prison
4 conditions under section 1983 of this title, or any other Federal
5 law, by a prisoner confined in any jail, prison, or other
6 correctional facility until such administrative remedies as are
7 available are exhausted.").

8
9 An inmate's failure to exhaust administrative remedies prior to
10 the filing of the district court complaint is an appropriate basis
11 for dismissal. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003)
12 (if the district court concludes that the prisoner has not exhausted
13 nonjudicial remedies, the proper remedy is dismissal of the claim
14 without prejudice) (citing Ritza v. Int'l Longshoremen's &
15 Warehousemen's Union, 837 F.2d 365, 368 (9th Cir. 1988)); McKinney
16 v. Carey, 311 F.3d 1198, 1199-1200 (9th Cir. 2002)(dismissal is
17 appropriate where the prisoner failed to exhaust administrative
18 remedies prior to filing suit even though the prisoner was in the
19 process of doing so during the course of the litigation).

20
21 The administrative remedy procedures for the BOP are set out at
22 28 C.F.R. §§ 542.10-542.19. This program is a four-tiered review
23 process comprised of an informal resolution process, and requests to
24 the Warden, the Regional Director, and the Office of General Counsel.
25 Specifically, inmates must generally first attempt to resolve their
26 claims informally with the unit. 28 C.F.R. § 542.13(a). If
27 dissatisfied, the inmate must submit a formal administrative remedy
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1 request to the warden using the BP-9 form. 28 C.F.R. § 542.14.
2 This institution-level remedy request submitted with the Warden is
3 commonly referred to as a BP-9. The inmate has 20 calendar days
4 following the date on which the basis for the request occurred to
5 file the BP-9. 28 C.F.R. § 542.14.
6

7 The warden's decision can be appealed to the Regional Director
8 using the BP-10 form. 28 C.F.R. § 542.15(a). Finally, if still
9 dissatisfied, the inmate may further appeal to the General Counsel
10 using the BP-11 form. 28 C.F.R. § 542.15(b). Only after inmates
11 complete this process may they bring their claims to court. 42
12 U.S.C. § 1997e.

13 Here, there is no evidence that defendant exhausted all of the
14 remedies available. Until he exhausts those remedies, defendant
15 cannot apply to the court for relief.
16

17 **IV. CONCLUSION**

18 Defendant's motion for emergency protective order should be
19 dismissed because this Court has no authority to address defendant's
20 conditions of confinement at a correctional facility located in the
21 Eastern District of Arkansas. Even if the Court could reach the
22 merits of defendant's motion, the motion should be dismissed because
23 defendant has provided no evidence that he has exhausted all
24 administrative remedies.
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